Supreme Court of the United States

OCTOBER TERM, 1940.

No. 607.

AMERICAN LUMBERMENS MUTUAL CASUALTY COMPANY OF ILLINOIS,

Petitioner,

—against—

ELIZABETH SUTCLIFFE, as Administratrix *de bonis non* of the goods, chattels and credits which were of MARGARET SUTCLIFFE, deceased, GEORGE FUERST and ELIZABETH SCHENCK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

Table of Cases Cited.

Statute.

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SUMMARY STATEMENT.

On December 5, 1934, respondents were injured and respondents' intestate was killed in an automobile collision on a New York highway. They instituted actions to recover damages for personal injuries and wrongful death in the Supreme Court of the State of New York against petitioner's assured, Maxweld Corporation. Respondents recovered judgments in that action, which judgments were affirmed by the Appellate Division and the Court of Appeals of the State of New York.

As judgment creditors of petitioner's assured, respondents, by virtue of the authority of the New York Insurance Law,

Section 109, sued petitioner directly on a policy of automobile liability insurance in the Supreme Court of New York (54). Petitioner removed the action to the United States District Court for the Eastern District of New York where the action was tried without a jury. Upon this trial petitioner conceded its liability to respondents under the policy to the extent of $10,000.00 (126). Respondents claimed that the policy covered petitioner's assured with respect to the automobile involved in the accident to the extent of $50,000.00 (54). The District Court found for the lower limits (R., 87) and rendered judgment accordingly (R., 100).

From this judgment, respondents appealed to the United States Circuit Court of Appeals for the Second Circuit contending that the terms of the policy clearly provided for coverage of $50,000.00 for the automobile involved. The Circuit Court of Appeals sustained respondents' contention (R., 115) and modified the judgment accordingly (R., 121).

Respondents' Position.

The decision of the Circuit Court of Appeals is not in conflict with applicable local decisions.

A. Contrary to petitioner's assumption, the Circuit Court of Appeals did not hold that the amount of coverage under the policy was derived from or determined by the Extended Coverage Clause of the policy nor did it hold or even intimate that said clause prohibited a limitation of the amount of coverage.

1. The local court decisions cited in the petition as in conflict with the Circuit Court's decision have neither identity nor similarity with the subject matter of the Circuit Court's decision; are wholly irrelevant to any question decided therein and, accordingly, cannot be in conflict with the decision in any manner whatsoever.

2. Even accepting petitioner's erroneous interpretation of the Circuit Court's decision as correct, petitioner fails to

demonstrate any conflict between the decision as interpreted by it and the decisions of the local courts.

3. The Circuit Court's opinion is a clear and reasonable interpretation of the policy of insurance determining the amount of coverage from the provisions of the policy pertinent to the issue and looking to the whole policy, including the Extended Coverage Clause, as instructive in determining the intent of the parties to the policy.

B. The Circuit Court of Appeals did not apply the rule of strict construction against petitioner.

1. The Circuit Court expressly stated that there was no need to apply the rule of strict construction as it found no doubt or ambiguity in the language of the policy.

2. As it is the settled law of New York that the effect of Section 109 of the New York Insurance Law is to give the injured claimant all the rights of the assured, even if the rule of strict construction were applied it would have been consistent with the law of New York which is that, in case of doubt as to the meaning of the words of a policy, they should be resolved against the drawer of the policy.

ARGUMENT.

POINT I.

PETITIONER'S INTERPRETATION OF THE CIRCUIT COURT'S DECISION IS ERRONEOUS. EVEN UPON ITS INTERPRETATION THERE APPEARS NO CONFLICT WITH LOCAL DECISIONS.

In undertaking the construction of the policy, the Circuit Court of Appeals rightly accepted the adjudications of the State Court on the issues of ownership and control of the insured automobile as *res judicata* in accordance with the settled law of New York (R., 116) and did not consider the

question as one of general law. The case of *New York Life Insurance Company* v. *Jackson*, 304 U. S. 261, was an action brought by the insurer to cancel the reinstatement of a life insurance policy on the ground that it was obtained by fraud. The lower court considered the question as one of general law, but the Supreme Court of the United States held that its decision should have been made according to the applicable principles of the state law which governed the interpretation of the policy and it was because of that error that certiorari was granted.

Erie R. R. v. *Tompkins*, 304 U. S. 64;
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202.

The construction of the policy by the Circuit Court of Appeals in the case at bar was based upon a meticulous examination and analysis of all of its provisions. The issue of the amount of coverage "must be answered from the policy itself" (R., 117).

The Circuit Court determined the amount of coverage from the provisions of Special Condition 8 (R., 117); the entries upon the typewritten attached schedule (R., 118); the specific premium entered thereon (R., 119) and the Increased Public Liability Limits Clause (R., 120) as well as all of the General Conditions of the policy (R., 120). The Extended Coverage Clause was considered by the court as were other "General Conditions" of the policy because they were instructive and "entirely consistent with our conclusion that whoever else may be protected, the 'Named Assured' herein is certainly protected, and is protected to the utmost extent of anyone in the premises" (R., 120).

The Circuit Court's opinion demonstrates conclusively that it determined the amount of coverage from the provisions of the policy other than the Extended Coverage Clause which it nevertheless considered as further supporting and as consistent with the court's conclusion. There is no intimation in the opinion that the Circuit Court employed the Extended Coverage Clause to determine the amount of cov-

erage or to extend the amount of coverage, as petitioner subtly suggests.

The Circuit Court did not and respondents do not dispute that the amount of coverage afforded the Named Assured as determined by the Circuit Court from the schedule and other provisions of the policy, was, by the provisions of the Extended Clause, extended to persons not named in the policy. But the Circuit Court was not called upon to construe the meaning of the Extended Coverage Clause. It was called upon to determine the amount of coverage to the Named Assured. Whether the coverage to the Named Assured extended to others was outside the issue.

The utter futility of petitioner's argument appears conclusive from the presupposition that to extend the amount of coverage to others not mentioned in the policy, as rightly claimed by petitioner, there must exist a fixed amount of coverage for the Named Assured. The Circuit Court confined itself to the issue of determining the amount of coverage to the Named Assured which it did by a reasonable interpretation of the plain import of an unambiguous contract.

The local decisions cited have no applicability to the issue decided and bear no similarity to the facts or situation presented. Their citation by petitioner demonstrates a reckless disregard for relevancy. Being wholly irrelevant there cannot be demonstrated any conflict of any nature.

In *Weiss* v. *Preferred Acc. Ins. Co.*, 241 App. Div. 545, the Supreme Court of New York held that an insurer, under a policy of insurance which expressly excluded from its coverage any liability arising from the operation of an automobile by one under the legal age limit of eighteen years, is not liable for any judgment obtained against its insured by reason of such illegal operation of the automobile.

Deritt v. *Continental Casualty Co.*, 269 N. Y. 474, was to the same effect holding that where the policy specifically provides that the assured shall forfeit his rights under the policy if he permits anyone under the age limit fixed by the laws of the State of New York to operate his motor vehicle,

the insurer is not liable to injured persons for the risk was specifically excluded from coverage and Section 109 of the Insurance Law does not have the effect of extending the liability of the insurer to cover such operation specifically excluded.

The foregoing cited cases obviously have no similarity or relevancy to the case herein. They may only serve to support the Circuit Court's opinion that if the policy intended to limit the amount of coverage or separate the liabilities thereunder, appropriate specific provisions could and would have been made.

Lavine v. *Indemnity Ins. Co.*, 260 N. Y. 399, involved the construction of a policy entirely unlike the one involved herein. The policy was known as an "automobile garage public liability policy" wherein the assured was not the owner and it contained an express limitation that the insurer's liability would attach only in case of accidents resulting from the use of automobiles for a purpose usual to the assured's operations of its sales business in Albany, New York. Accordingly, where a person was injured by an automobile used in connection with its Schenectady business, the insurer was not held liable.

It is manifest from the Circuit Court's opinion that it construed the whole policy according to the sense and meaning of the terms used therein as understood in their plain, ordinary and popular sense (R., 121). The Circuit Court found no ambiguity. It said: "As we analyze the policy we do not think there is substantial doubt * * *" (R., 121). Both sides agreed that there was no ambiguity in the language of the policy (R., 33).

It is the settled law of New York that a contract of insurance, like other contracts, is to be construed according to the sense and meaning of the terms used, which, if clear and unambiguous, are to be understood in their plain, ordinary and popular sense.

Auerbach v. *Maryland Casualty Co.*, 236 N. Y. 247;
Savery v. *Comm. Trav. Mut. Acc. Ins. Co.*, 238 App. Div. 189.

The written provisions prevail over the printed parts of a policy.

Metzger v. *Aetna Ins. Co.*, 229 App. Div. 26.

The premium may be resorted to as a guide to discover the amount intended to be insured.

Post v. *Phoenix Ins. Co.*, 10 Johns 79.

Manifestly, the Circuit Court applied these fundamental principles of the New York law in construing the policy, thus using the same rules of construction as are applied by the local courts.

POINT II.

PETITIONER'S REASON (6) (PAGE 2 OF THE PETITION) ASSUMES (1) THAT THE CIRCUIT COURT APPLIED THE RULE OF STRICT CONSTRUCTION AGAINST THE INSURER, AND (2) THAT SECTION 109 OF THE INSURANCE LAW MUST BE STRICTLY CONSTRUED. BOTH ASSUMPTIONS ARE ERRONEOUS. EVEN ASSUMING THE ASSUMPTIONS TO BE CORRECT, THERE WOULD BE NO CONFLICT WITH LOCAL LAW.

Petitioner insinuates, but does not directly say, that Section 109 of the New York Insurance Law, being in derogation of the common law, should be strictly construed, but petitioner undoubtedly knows that the Court was not called upon here to construe Section 109. The sole issue was the construction of a contract of insurance. True, the insertion of some of the provisions of this contract is compelled by Section 109 and plaintiffs are made beneficiaries thereby, but it is nonetheless the construction of a contract of insurance and not Section 109 which was in issue.

It is a fundamental legal principle in New York that the rule of strict construction applies only in cases of ambiguity in the language of insurance policies. Concededly, there existed no ambiguity (R., 33). The Circuit Court so found

(R., 121). The Circuit Court, summing up its opinion on this point, says at page 121 of the record:

> "As we analyze the policy we do not think there is substantial doubt (and, hence, we do not consider plaintiffs' exceptions to the exclusion of evidence claimed to afford light as to its meaning); although if there is any, it should not inure to the benefit of the company which wrote the contract. *Strochmann v. Mutual Life Ins. Co.*, 300 U. S. 435, 57 S. Ct. 607."

Clearly, the Circuit Court expressly stated that the contract not being ambiguous, it was not necessary to apply the rule of strict construction.

Even if the Circuit Court had applied the rule of strict construction, it would have pursued a course consistent with and not in conflict with the established local law.

It is the settled law of New York that by virtue of Section 109 of the New York Insurance Law, the rights of the injured person to recover against a liability insurance carrier are co-extensive with the assured's right.

> "The effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied."
>
> *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 275.

All the rights of the assured vest by state law in the injured judgment claimant.

> *Merchants Mutual Automobile Lia. Ins. Co. v. Smart*, 267 U. S. 126, 130, 131.

As between the writer of a policy of insurance and the beneficiary thereof, whether the beneficiary is created by statute or otherwise, it is fundamental that in case of ambiguity the policy shall be construed strictly against the

writer, particularly so in view of the settled law of New York that the injured judgment claimant is vested with all the rights of the assured.

The cases cited by petitioner do not in any way impair this conclusion nor do they demonstrate any probable conflict with the Circuit Court's opinion, even assuming that the Circuit Court applied the rule of strict construction.

American Lumbermen's Mutual Cas. Co. v. *Trask*, 238 App. Div. 668, aff'd., no. op., 264 N. Y. 545, was a case wherein the Named Assured loaned her car to an automobile sales agency for demonstration purposes. The borrower struck the injured persons who obtained judgments against both the assured and the borrower. The borrower and the assured's carrier each paid one-half of the judgments. The carrier sued the borrower for reimbursement of the one-half paid by it. The borrower contended that by the terms of the policy the relation of insured and insurer was created between it and the carrier while it operated the automobile with the consent of the assured and, hence, being an assured under the policy, it owed no obligation for reimbursement to the insurer.

The Court held that the borrower was a total stranger to the policy and was not a beneficiary thereof by virtue of the terms of the policy or by virtue of any statute. That, therefore, the rule of strict construction could not apply between a stranger and the insurer. The case did not involve the rights of the injured person, whose judgment, it will be noted, was partially paid by the insurer. The case did not involve the rights of a beneficiary of the policy as it does here, a beneficiary made such by statute as well as by the contract. The case is wholly irrelevant to petitioner's alleged point. As between the injured judgment claimant and the insurer, can it be seriously disputed that the policy would be construed strictly against the insurer in view of the settled law that the injured person is vested with all the rights of the assured?

Jackson v. *Citizens Casualty Co.*, 277 N. Y. 385, has no bearing on the issues whatsoever. This case stands for the proposition that as Section 109 of the Insurance Law specifies the class exclusively to whom the rights of the assured are given, namely, injured judgment claimants, the cause of action accorded to this class by the statute is not assignable.

The irrelevancy of the case and its obvious lack of similarity to the case herein precludes any probability of conflict with the Circuit Court's decision.

In the case of *Royal Indemnity Co.* v. *Travelers Ins. Co.*, 244 App. Div. 582, affd. (no. op.), 270 N. Y. 574, the Court of Appeals had occasion to pass upon the portion of Section 109 of the New York Insurance Law, which gave substantive rights in derogation of the common law, that is, the portion which created new beneficiaries. In that case the Court held that the right of action therein, being given only to injured persons, a compensation insurance carrier, subrogated to the rights of the injured, may not maintain an action against the public liability automobile insurer. This substantive right being created in derogation of the common law is to be strictly construed.

In a case passed upon later, however, namely, *Materazzi* v. *Commercial Casualty Co.*, 157 Misc. 365, 283 N. Y. S. 942, affirmed in 283 N. Y. S. 430, leave to appeal to the highest appellate tribunal of New York denied in 284 N. Y. S. 358, the Court said:

> "The statute is remedial in nature and should not be narrowly construed."

Though the statute must be strictly construed, it does not follow, however, as petitioner seeks to imply, that the policy shall be strictly construed against the beneficiaries. Petitioner's theory is both fallacious and inconsistent with the local courts' decisions that the injured persons named in the statute shall "stand in the shoes" of the assured and become vested with all the rights that the assured is entitled to under the policy.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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JOSEPH GIORDANO,
On the Brief.